

IN ARBITRATION PROCEEDINGS PURSUANT TO THE 1996-2000 COLLECTIVE  
BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of Arbitration	)	
	)	OPINION AND DECISION
between	)	
	)	OF
SACRAMENTO REGIONAL	)	
TRANSIT DISTRICT	)	PAUL D. STAUDOHAR
	)	Arbitrator
and	)	
	)	C.S.M.C.S. Case No. ARB-00-0152
AMALGAMATED TRANSIT UNION,	)	
LOCAL 256, AFL-CIO	)	
_____	)	

APPEARANCES:

FOR THE DISTRICT

LARRY M. KAZANJIAN, ESQ.  
Palmer, Disario, Kazanjian & Holden  
980 9<sup>th</sup> Street, Suite 2000  
Sacramento, California 95814

FOR THE UNION

LINDA LU CASTRONOVO, ESQ  
Neyhart, Anderson, Freitas, Flynn & Grosboll  
600 Harrison Street, Suite 535  
San Francisco, CA 94107

This is an arbitration involving whether the District has the right to redirect a bus driver off his regular route onto another route that needed to be covered in an exigent situation. The Parties to this arbitration are SACRAMENTO REGIONAL TRANSIT DISTRICT (hereinafter called "District") and AMALGAMATED TRANSIT UNION, LOCAL 256, AFL-CIO (hereinafter called "Union").

The Arbitrator was appointed by letter of October 11, 2000, from the California State Mediation and Conciliation Service, having been mutually selected by the Parties. The Arbitrator is the neutral member of a tripartite arbitration board, which also includes Linda Lu Castronovo as the Union's Board Member and Larry M. Kazanjian as the District's Board Member.

Hearings were conducted on December 7, 2000, and January 4, January 12, and February 14, 2001. The first, second, and fourth days of hearing were held at the Sutter House in Sacramento, and the third day of hearing was held at the Clarion Hotel in Sacramento. Transcripts of the hearings were made by a Certified Shorthand Reporter. Testimony was received under oath from three Union witnesses and two District witnesses, who were submitted to full examination and cross examination by Counsel. Three joint exhibits, 20 Union exhibits, and one District exhibit were introduced into the record. Post-hearing briefs were filed by May 1, 2001.

### **Case Background**

At approximately 6:35 a.m. on June 2, 2000, bus operator Tom Crouch called in sick. This necessitated that Crouch's route be covered by other personnel. The route in question was contracted with the Sacramento Area Retarded (SAR), and involved transporting handicapped and disabled individuals. The District assigned the first part of Crouch's route to

driver Bernardo Cruz. There is no question as to the propriety of this assignment. However, the District was unable to find an available extra driver for the time frame of approximately 2:20 p.m. to 4:30 p.m. As a result, the District pulled a driver, Joseph Rovito, off his regular route and assigned him to handle the unfilled portion of Crouch's SAR route. After completing the two hour and ten minute reassignment, Rovito returned to his regular route for the remainder of his workday.

Fundamentally, the dispute arises from the Union's claim that the District has no right to redirect a regular operator off his preassigned route, because to do so would violate the collective bargaining agreement. The District's rejoinder is that it was obligated by contract to service the SAR route and, unable to find an available driver, had to take a driver off his regular route.

Although the dispute may seem straightforward enough on its face, complexity arises because numerous provisions of the negotiated agreement are in question. Also, there are various categories of drivers and a specialized manner in which work assignments are made. Moreover, there are some factual disputes and a question of whether and to what extent past practice comes into play.

The main categories of full-time drivers are Regular and Extra Board. Regular operators bid on a quarterly basis for their routes and get regular days off. There were about 300-400 regular operators during the period in question. Extra board operators work a variety of routes, filling in for drivers who are ill, on vacation, on workers' compensation leave, etc. The extra board drivers learn of their assignments only the day before they are scheduled. Similar to regular operators, extra board personnel bid for their work, but their actual assignments are subject to frequent change. There were 47 extra board operators during the period in question.

The workday starts at 4:15 a.m. What is called “known work” is that which is placed in its proper position and assigned prior to 11 a.m. the preceding day. “Not known” work is that which is assigned after 11 a.m. on the previous day. The SAR route in question was “not known” work because the District did not realize its need for reassignment before 11 a.m. on June 1.

Also of interest in this case is what is called a “tripper.” This is a bus trip of short duration, usually an hour or two but always less than a full shift. Trippers are paid at a rate of time and one-half. They may be assigned before a driver’s regular route, after the regular route, or sometime in between if a driver is working a split-time route. A tripper can be a run that is required on a regular basis and is put out for bid, or it can be any extra work that needs doing. Drivers sign up on the tripper list to receive this extra work. Tripper assignments, as well as work for regular operators, extra board operators and other categories, are all done on the basis of seniority.

### **Collective Bargaining Agreement Provisions**

The following provisions of the Parties’ negotiated agreement are especially relevant:

Article 7, ARBITRATION, provides in Section 4 that

The issue to be submitted to the Arbitration Board shall be limited to the grievance as submitted in writing and, unless otherwise agreed in writing, the jurisdiction of the Board shall be limited to the determination of said issue. The Board shall have no authority to modify, vary, alter, amend, add to or take away from, in whole or in part, any of the terms or provisions of this Agreement.

### **ARTICLE 30: MANAGEMENT PREROGATIVES**

**SECTION 1** – All matters pertaining to the management of operations including the type and kind of service to be rendered to the public and the equip-

ment used, the maintenance of discipline and efficiency, the hire, promotion, and transfer of employees and their discharge or discipline for just cause, are the prerogatives of the DISTRICT, subject always to such limitations thereon as are set forth elsewhere in the Agreement.

## ARTICLE 52: SELECTION OF RUNS

SECTION 1 – There shall be a general sign-up to take effect on the first Sunday of January, the first Sunday of April, the Sunday following termination of the regular school term in June, and the first Sunday preceding the commencement of the regular school term in September. The effective dates may be changed by mutual consent of the DISTRICT and the UNION.

SECTION 2 – Notice of the sign-up shall be given to employees on leave or vacation at their most recent address in the files of the DISTRICT. Such employee or any other employees may leave a proxy bid with the Dispatcher and the DISTRICT will select a run for the employee concerned according to the choice indicated on the proxy. The order of the employee's choice shall be designated in numerical order. If the run or runs specified in the proxy are not available and the employee cannot be contacted, a run will be selected by the DISTRICT. Runs so selected shall conform as near as possible to the hours of work and days off indicated as the employee's choice in the proxy.

...

SECTION 16 – All operators desiring extra work will sign a slip indicating their desire and will list their choices of work in order of preference. This slip will be signed at each sign-up and the DISTRICT will use this list to call Operators for extra work assignments during the sign-up period.

...

## ARTICLE 53: WORK DAY/WORK WEEK – REGULAR

OPERATOR

SECTION 1 –

- a. All regular runs shall be guaranteed a minimum of eight hours (8:00) of work on each of five (5) consecutive days except when the system is rendered inoperative due to war or Acts of God over which the DISTRICT has no control
- b. If a leg or more of the light rail system is shut down, or to be shut down, for eight (8) hours or more, LRV Operators may be used to drive buses in shuttling service during their normal work hours and be paid no less than their normal pay as LRV Operators.

...

ARTICLE 54: EXTRA BOARD OPERATORS AND PROVISIONS

...

SECTION 12 –

- a. Extra work will be assigned in the following order:
  1. Extra Board Operators on their regular workday;
  2. Regular Operators on their regular workday;
  3. Extra Board Operators on their day off;
  4. Regular Operators on their day off.

...

ARTICLE 55: ROTATING EXTRA BOARD PROCEDURES

...

SECTION 10 – Any work which is known to be open on or before 11:00 a.m. the preceding day shall be placed in its proper position as provided for in Section 5 above and be

assigned accordingly. Any work which becomes available after 11:00 a.m. the day preceding shall be assigned in the same manner as if it has become available on the following day. If an out-of-area charter becomes available after 11:00 a.m. on the preceding day, it shall be assigned to the proper Charter Board Operator and his/her assignment shall be covered as above. If this Operator cannot be contacted, the Dispatcher shall try the next Charter Board Operator in rotation, etc. If no Charter Board Operator can be reached, or if time will not permit going through this procedure, the Charter shall be assigned to the proper report Operator and the Charter Board Operators so passed will not be charged with a "turn" on the Charter Board and shall have no claim for the time in the charter.

SECTION 11 – Any work which is canceled after 11:00 a.m. on the day preceding shall not be operated and the Operator assigned to this work shall be placed on report at the time the canceled work was scheduled to start and catch work in his/her rotated position as in Section 8 above.

...

## ARTICLE 56: TIME ALLOWANCES

...

SECTION 5 – When a regular Operator performs an additional piece of work before or after his/her regular run or during a split, he/she shall be paid elapse time at the contractual rate of pay together with the actual time in the piece of work involved, provided the elapse time is one hour (1:00) or less. For the purpose of applying Sections 5 and 6 of this Article, elapse time is defined as off-duty time. In no event shall the pay time for such tripper be less than two hours (2:00), including both elapse time and work time. For the purposes of this Section, when a driver is not relieved and drives to the end of the line and back to the relief point and is then relieved, this shall not constitute a "tripper".

SECTION 6 – If the elapse time is more than one hour (1:00), no elapse time will be paid but the Operator shall be paid a minimum of two hours (2:00) at the contractual rate of pay (Jt. Exh. 1).

...

### TRIPPER AGREEMENT

...

13. Operators who sign the tripper list, but do not receive trippers on a regular basis, (i.e., three (3) times a week) shall be contacted on each occasion they are eligible for extra work.

13(a). The provision in paragraph 13 providing that "Operators who sign the tripper list but who do not receive trippers on a regular basis (i.e., three (3) times a week) shall be contacted on each occasion they are eligible for extra work," shall be exercised by the dispatcher contacting the employees on the tripper list, in seniority order, and offering them a choice of the tripper pieces of work available as to each of them. Any operator who cannot be contacted shall be passed, and Operators for whom a message can be left will be advised that tripper work is available and that they should contact the Dispatcher immediately. The Dispatcher will continue to call from the seniority list, and any person returning a call from a message left before 11:00 a.m. will choose from any work that his/her seniority permits. If an operator calls back after 11:00 a.m., he/she will be offered a choice of whatever tripper work is available at that time.

If work is offered and accepted before 11:00 a.m. and a change occurs before 11:00



a.m., all work must be re-offered on a seniority basis.

All contacts and attempted contacts will be documented and included in the daily summary. These may be made either before or after 11:00 a.m. Tripper work becoming available after 11:00 a.m. by either work being accepted and then rejected pursuant to paragraph 5 of this Agreement, or new work becoming available may be either offered to the senior Operator on the tripper list not previously offered work or assigned to the extra board pursuant to the Collective Bargaining Agreement.

14. After the tripper list has been exhausted, all Operators shall be contacted in seniority order (Jt. Exh. 3).

### **Position of the Union**

In its post-hearing brief, the Union contends that the District failed to follow the required sequence of offering extra work to extra board operators, then to regular operators, and so on down the line. The District's actions are said to violate Article 54, Section 12; Article 52 on operators' rights to select their runs; the Tripper Agreement; and the seniority requirements. Also, the Union argues that there is no evidence that the District made any calls to operators on June 2, so as to locate operators on a tripper basis to cover the SAR route.

The Union notes that even the District witnesses contradict each other on whether there was a "job action" on June 2, where drivers refused to accept overtime assignments.

Because the negotiated agreement covers all means of assigning or offering extra work to operators, and the redirection of Joseph Rovito is not allowed in the agreement, the

Union contends that the redirection does not fall under the exceptions in the agreement, such as acts of God. Nor is the management rights clause said to apply, because it is specified therein that it is subject to limitations set forth elsewhere in the agreement.

Citing arbitral criteria for interpreting past practice, the Union notes that the District is not using this concept to clarify contract language, implement language, or create a separate enforceable condition of employment. Instead, the contract is said to clearly provide that regular operators are entitled to do their route for the three-month bidding period, and the District cannot deprive them of their regular routes which were bid by seniority.

It is also clear, posits the Union, that “extra work” shall be available to regular operators in seniority order and that they have the right to refuse to do any “extra work” when contacted. Because the work of Mr. Crouch on June 2 was “extra work” that became available after 11 a.m. the prior day, this work should have been given to an available extra board operator and, if none were available, then to a regular operator for performance before, after, or during a (split) shift.

Reference is made by the Union to a paper by Arbitrator Theodore St. Antoine, delivered at the 2000 meeting of the National Academy of Arbitrators. Mr. St. Antoine lists four criteria for determining when a past practice may prevail over clear contract terms: (1) clarity, (2) consistency, (3) longevity, and (4) mutual acceptability. The Union contends that clarity is lacking because the alleged past practice of redirecting drivers is not clear. For instance, if redirection took place as a result of a personnel shortage in the past, it is not a past practice, because Dispatcher Manuel Hernandez acknowledged that it did not occur regularly.

Consistency is found lacking because, according to District witnesses, sometimes the District redirected routes and sometimes they simply canceled routes. There is no longevity,

according to the Union, because District witnesses did not testify as to duration, while Union witnesses testified that no such occurrence took place since 1964. Mutual acceptability is said to be lacking because two Union presidents since 1964 testified that they did not know about any prior redirection. Thus, they could not agree to a past practice that they were unaware of.

As a remedy, the Union seeks that Mr. Rovito and any other affected employees be made whole for the improper redirection and failure to offer work to appropriate employees.

### **Position of the District**

In its post-hearing brief, the District characterizes the Union's argument as follows: that regular operators have an inalienable right to their bid routes, and that under no circumstances can the District temporarily reassign or redirect a driver from his or her route, even if exigent circumstances are present.

According to the District, the Union has taken a shotgun approach by arguing that numerous provisions of the negotiated agreement prohibit the District from exercising its management right to direct the workforce. Yet, argues the District, apart from opinionated testimony, the Union has offered no credible evidence of its view and so has failed to sustain its burden of proof.

The District posits that the two key questions are (1) whether the agreement prohibits it from reassigning drivers from their bid route in exigent circumstances, and (2) were there exigent circumstances present when the reassignment was made on June 2?

As to the first question, the District argues that there are no express or implied contract provisions prohibiting reassignment. Although Articles 53-56 and the Tripper Agreement are said to be "exhaustive in their detail," nothing refers to reassignment in exigent cir-

cumstances. The District acknowledges that under “normal” operating circumstances it cannot reassign a driver from his bid route when other drivers are available to perform extra work.

Referring to the testimony of former Union president Roy Williams, who negotiated the 1980 Tripper Agreement and its 1997 modifications, the District contends that he never discussed what happens when no operators were available from the extra board, tripper list, or day-off list to do the work. Thus, argues the District, the intent of the parties cannot be determined if the issue was not discussed in negotiations.

Reference is made to the situation of Mr. Rovito, who was asked to do what he normally does: drive a bus. He was taken off his route for only two hours and worked his usual total hours for the day. He was also paid at his normal rate and suffered no monetary loss. If one considers the two-hour reassignment as part of his total work year, it would only amount to one-tenth of one percent, a *de minimus* amount in the District’s opinion.

The District cited current Union President Donald Delis’s testimony that if the District could not find an operator from the extra board, tripper list, or day-off list, it should have canceled that portion of the SAR route. Yet, argues the District, cancellation would cause abandonment of disabled and handicapped persons, a harsh result that was unjustified under the circumstances. The District notes its right to control manpower scheduling unless specifically limited by the agreement and that the Arbitration Board cannot modify the agreement terms. Management rights may be exercised, argues the District, in situations of emergency changes in the work schedule.

Concerning whether exigent circumstances were present, the District references the testimony of Transportation Superintendent John Darragh and Dispatcher Hernandez. It contends that the manpower shortage on June 2 created exigent circumstances beyond its con-

trol. So many drivers were off work for various reasons that numerous runs were canceled due to driver unavailability. Although the Union sought to establish that drivers were available to work the SAR route in question, this is said to be unsupported by the evidence.

Regarding past practice, the District cites various emergencies in which reassignments of regular operators occurred. While Mr. Delis and Mr. Williams testified that they were unaware of such reassignments, the District argues there is no doubt that these incidents did happen.

### **Opinion**

The Parties stipulated that the matter is properly before the Arbitration Board for a final and binding adjudication (Tr., pp. 5-6). However, they were unable to agree on a stipulated issue. According to the Union, the issue should be “Did the employer violate the collective bargaining agreement as alleged in the grievance dated June 9, 2000? If so, what shall be the remedy?” (Tr., p. 4.) According to the District, the issue should be “Does the District have the right to temporarily redirect its work force to avoid or minimize disruptions in service in accordance with the management rights clause of the collective bargaining agreement?” (Tr., p. 4.) It seems that an appropriate representation of the issue would be: Did the District violate the collective bargaining agreement by temporarily reassigning Joseph Rovito from his regular route on June 2, 2000, and if so, what shall be the remedy?

Dispatcher Hernandez claimed that some members of the Union were refusing to work overtime on June 2, and that in the next couple of weeks the practice escalated so that drivers were not accepting any overtime at all (Tr., p. 606). Were there such a refusal on June 2, it would have contributed to the personnel shortage. Both Superinten-

dent Darragh and President Delis, however, testified that drivers were unwilling to work overtime from June 7, but there was no such problem on June 2 (Tr., pp. 439, 711-712). Although Mr. Hernandez would seem to be directly able to observe a refusal to work overtime (Tr., p. 791), the conclusion cannot be drawn that this was a problem on June 2.

What then was the reason for the manpower shortage on June 2? Dispatcher Hernandez testified about the District's transportation summary, which is a record of how many operators were available and the assignments given out. Reflected in this summary is absenteeism, people on vacation, floating holidays, workers' compensation, union business, and other reasons (Tr., p. 596). Based on this summary, Hernandez testified to a "very unusual occurrence" of having only 11 regular report operators and 18 combination report operators available (Tr., p. 597). As a result, there were 43 tripper assignments that had to be made, a volume rarely seen before, and considerable overtime had to be paid (Tr., p. 605). Superintendent Darragh was also aware of a "serious unavailability of operators for various reasons." (Tr., p. 558.) He testified that several runs were canceled (Tr., p. 599). Based on this testimony, there is no doubt that a severe manpower shortage existed on June 2.

The SAR routes for disabled persons are contracted by the District. They cannot be canceled (Tr., pp. 416, 601). Therefore, the District had a priority for coverage of the SAR route that was uncovered as a result of Tom Crouch's calling in sick. Mr. Darragh testified that the pressures of trying to fill routes caused options to run out in locating available drivers (Tr., pp. 413-415). He indicated that the District tried to contact drivers prior to the assignment of the work to Mr. Rovito (Tr., p. 436). However, because dispatchers do not always document all the individuals who have been contacted, there was no detailed record of this activity (Tr., p. 422). Mr. Hernandez testified that because no

one was available to work the SAR run, Mr. Rovito was contacted (Tr., p. 608).

On the other hand, Mr. Delis testified that even if no extra board drivers or drivers on the tripper or day-off lists are available, the District still cannot pluck regular drivers off their bid routes to cover the extra work, because to do so would be a violation of seniority (Tr., pp. 274, 701). According to Mr. Delis, the appropriate thing to do, if all lists were exhausted, would be to contact drivers who did not sign the lists (Tr., p. 365).

Joseph Rovito is the driver who was called off his route to fill the SAR segment. A bus driver since 1990, he has been a member of the executive board of the Union since 1996. He has also served as an extra board checker, giving him some experience in the area of work assignments. Mr. Rovito testified that his research uncovered an employee, Bradley Lapp, who was eligible for assignment to the SAR segment he performed (Tr., p. 324). This testimony is contradicted, however, by that of Mr. Hernandez, who indicated that he had personally contacted Mr. Lapp and that Lapp told him he was unavailable (Tr., p. 585). Thus, Mr. Lapp's name was taken off the list and he was not available to be called on June 2 (Tr., p. 584).

It therefore appears that either the District did exhaust the process of contacting available drivers or it made every reasonable effort to do so, given the hectic nature of the day and the time constraints involved. The unusual manpower situation created a difficult situation for the District, which seems to have acted in good faith in seeking to fulfill its service obligations. Article 30 of the agreement, dealing with management rights, provides a measure of insulation in this regard. That provision, however, is conditioned on limitations which are set forth in other sections of the agreement.

Article 44 provides that "seniority shall prevail at all times," unless specifically excepted. Article 52 establishes four sign-up periods, selection of runs, and choice of

preference for extra work. This obligates the District to call listed operators for extra work assignments. Article 53 guarantees hours and days and allows for use of drivers for shuttle service in the event of shutdowns in the light rail system. Article 54 provides for the order of calling drivers for extra work, referring to overtime (tripper) work. Article 55 deals with assignment of work, referring to when availability of work becomes known. Article 56 refers to payment for elapse time. The Tripper Agreement regulates the process of contacting employees for extra work.

Important as these provisions are, there is no language in any of them which specifically restricts the District from taking a regular operator off his or her route for a brief period of time in the event of an emergency situation. It may be that these provisions, taken as a whole, could be construed to impose such a restriction. But if this is the case it is far from clear. When clarity is lacking, past practice is typically examined to shed light on the interpretation of the agreement. It does not appear that Arbitrator St. Antoine's four criteria are applicable here, because he is referring to a situation in which a past practice may prevail over clear and express contract terms. In the instant case, the contract is neither clear nor express on the issue of reassigning a regular operator.

Nonetheless, in light of the strict application of seniority and the other relevant contract provisions (including the Tripper Agreement), there would certainly be a presumption that regular operators would not be reassigned during the approximately three-month period of the sign-up. But the question is whether the District can reassign under exigent circumstances. Important in determining this question is whether such practice has occurred in the past.

Mr. Delis testified that since 1973 he is unaware of a driver being reassigned or redirected from his regular route (Tr., p. 46). Former Union president Williams testified



to the same effect, and his experience goes back to 1964 (Tr., p. 280). As shown in Joint Exhibit 1 and Union Exhibits 3-12, there has been no material change in the relevant agreement language over the years.

This evidence, however, is contradicted by the testimony of Mr. Darragh and Mr. Hernandez. Darragh testified that there have been extraordinary occasions when drivers have been taken off their regular routes for short periods of time to fill District needs (Tr., p. 395). He referred generally to service emergencies, such as a light rail shutdown stranding passengers, which necessitated pulling regular drivers off their routes to perform shuttle service (Tr., p. 400). He also referred specifically to a fire at 8<sup>th</sup> and K Streets in May 2000, causing several regular drivers to be redirected to work a bus shuttle (Tr., pp. 401, 451, 456). In another case cited, from September 1999, regular operator Ralph Niz, a Union executive board member, was redirected to shuttle passengers due to a power failure in the light rail system (Tr., pp. 446-448). Darragh also testified to redirection of 10 regular drivers in December 1999 due to a derailment that disrupted service (Tr., pp. 457, 468, 475, 480).

Mr. Hernandez testified that as a dispatcher he has had occasion to redirect regular drivers off their route to a different route (Tr., p. 588). He cited an instance in 1981, resulting from buses losing their fuel tanks, which caused redirection of drivers; another situation in 1986 due to floods; and one in 1991 where hostages were taken at a Good Guys store in a mall that is a major terminal for the District (Tr., pp. 588-590). He also testified generally about situations of redirection of drivers in the event of fires, breakdowns, and manpower shortages (Tr., p. 591).

These examples indicate that although it is rare too have a regular driver taken off his or her route for a short period of time, it is not unprecedented. An acute manpower

shortage of the sort experienced on June 2 is sufficiently akin to the past emergencies cited by the District.

The District had to fill the SAR route and it acted in good faith to comply with proper procedure in trying to assign a driver from the extra board or appropriate lists. There is no evidence that the District failed to follow this procedure. When the pressure of time closed in and the SAR route needed filling, the District took Mr. Rovito off his regular route for a relatively brief period. He suffered no monetary loss as a result, and was back on his regular route that same day. What occurred here does not violate the collective bargaining agreement, taking past practice into account.

#### Award

After careful consideration of all written and oral evidence presented by the Parties, it is determined that the District did not violate the collective bargaining agreement by temporarily reassigning Joseph Rovito from his regular route on June 2, 2000.

Accordingly, the grievance is denied.

\_\_\_\_\_  
Paul D. Staudohar  
Arbitrator

\_\_\_\_\_  
Date

\_\_\_\_\_ Concur

\_\_\_\_\_ Dissent

\_\_\_\_\_  
Linda Lu Castronovo  
Union Representative

\_\_\_\_\_  
Date

_____	Concur	_____	_____
_____	Dissent	Larry M. Kazanjian District Representative	Date